

3 post-dated cheques, it is relevant to note that the payment slips (exhibit T6) referred to in paragraph 9 of the defendant's affidavit of 25 January 1991, showed that the payments were only made on 11 January 1990 and 13 January 1990, about two months **after** the defendant claimed for its return! To add to the confusion, the defendant averred in paragraph 23 of the same affidavit that the payment of RM44,000. was made by it on 13 January 1990 on the plaintiff's promise to remedy the chassis numbers, thus contradicting its own statement in paragraph 9. In the circumstances, the authenticity of the letter of 10 November 1989 purportedly sent by the defendant becomes highly questionable. What might remain as a triable issue would be the alleged contravention of s. 38 of the Hire Purchase Act 1967 and the consequences thereof.

In proceeding with this case I found guidance from the Federal Court in the case of *Shanghai Hall Ltd. v. Town House Hotel Ltd.* [1967] 1 MLJ 223, where it was held that:

the learned trial Judge after holding that there was one triable issue should have gone further and considered whether the appellant's defence was in bad faith or whether there were suspicious circumstances in the mode of presenting it or that the defence was a sham.

In my view, the defendant's version of the transaction is painfully dubious and would, in the circumstances attract the principle in *Paclantic Financing Co. Inc. & Ors. v. Moscow Narodny Bank Ltd.* [1987] 1 WLR 1063, where Robert Goff LJ stated as follows:

In all the circumstances, we agree ... that the case against the bank (defendant) ... should properly be described as shadowy ... In our Judgment, this is a classic case where leave to defend should be made conditional upon a payment into Court, if not of the entire sum at stake, then at least of a substantial part.

For the reasons stated above, I gave the defendant conditional leave to defend, the condition being payment into Court within one week of the sum of RM85,900. The amount was determined by taking RM176,000 being the sum claimed by the plaintiff, less RM90,100 being the proceeds of the preceding auction of the forklifts already deposited into Court.

a KHENG HOE (MALAYA) SDN. BHD.

v.

**DIRECTOR-GENERAL OF INLAND
REVENUE**

**b HIGH COURT, KUALA LUMPUR
DATUK HARUN BIN MAHMUD HASHIM J.
[TAX APPEAL NO: A1 OF 1984]
16 MAY 1994**

c REVENUE LAW: Appeal by way of case stated from the Special Commissioners of Income Tax - Whether payments made by appellant to its executives are commissions which are deductible under s. 33 of Income Tax Act 1967 - Whether such payments are in fact bonuses which are not deductible over and above the limits stipulated under s. 39(1)(h) of the Income Tax Act.

d Additional assessment was imposed on the appellant for the years of assessment 1975 to 1981 based upon the amendment to the Income Tax Act 1967 (the Act) by the addition of sub-section 39(1)(h) which restricted tax deduction for bonus paid to RM1,000 or two-twelfths of salary, whichever is greater.

e The appellant stated that the payments on which additional assessment was imposed were commissions paid to its executives and contended that as s. 39(1)(h) of the Act applies to the payment of bonus and not commission, the payments made did not fall under the said section. The Special Commissioners of Income Tax found in favour of the Revenue and the appellant appealed further.

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Held:

g [1] In a taxing statute, the question always is what is the real character of the payment, not what the parties call it. The issue whether commissions paid to employees as incentive payments from profits is bonus in the context of s. 33 of the Act read with s. 39(1)(h) of the Act has been considered by the Supreme Court in *Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd.* which held that the payment may be gratuitous as in the case of the non-managerial staff or it may be payment which the managerial staff are entitled to as "incentive" but nevertheless it is still a "bonus".

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[2] As it was clear from the resolutions of the Board of Directors of the appellant that the payments were to be incentive payments from

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profits, the decision in the *Highlands* case applies to the facts of this appeal.

[Appeal dismissed with costs. Deciding Order of the Special Commissioners confirmed].

Cases referred to:

C.I.R v. Wesleyan & General Assurance Society 30 TC 11 (refd)

Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd. [1988] 2 MLJ 99 (foll)

Legislation referred to:

Income Tax Act 1967, ss. 2, 33, 39(1)(h)

For the appellant - Nik Saghir; M/s. Nik Saghir, Yaacob & Ismail

For the respondent - Abdul Karim b. Jalil A-G's Chambers

JUDGMENT

Harun bin Mahmud Hashim J:

This is an appeal by way of case stated from the Special Commissioners of Income Tax. The question for their determination was:

Whether the payments made by the appellant to its executives pursuant to the resolution of the appellant are **commissions** which are deductible under s. 33 of the Income Tax Act 1967;

or

are **bonuses** which are not deductible over and above the limits stipulated under s. 39(1)(h) of the Act.

The appellant had appealed against the following additional assessment:

Year of Assessment	Additional Chargeable Income	Additional Tax
1975	RM399,853	RM199,296.50
1976	RM431,358	RM215,679.00
1977	RM380,759	RM190,379.50
1978	RM317,421	RM158,710.65
1979	RM390,012	RM195,006.15
1980	RM397,011	RM198,510.40
1981	RM475,965	RM238,729.40

In the event, the Special Commissioners decided in favour of the Revenue except the payments made to Madam Yap Siew Mui. Hence this appeal. There is no cross-appeal by the Revenue in respect of Madam Yap.

The facts as found by the Special Commissioners are as follows:

The appellant is a company which was incorporated on 22 August 1960. It is a company trading

a in hardware having its head office in Kuala Lumpur and its branch office in Penang. It commenced doing business on 1 November 1961.

At the First Directors' Meeting of the appellant held on 23 December 1960 it was resolved *inter alia* that the following officers be paid a commission of 5% each based on the annual net profit of the appellant:

- b* (a) Yap Boh Swee - General Manager
- (b) Teo Bian Joo - Manager
- (c) Ang Tiong Yong - Assistant Manager

The employees of the appellant were divided into two categories, viz:

- (a) Executives consisting of senior staff including the Managing Directors, Executive Directors, Managers and Assistant Manager; and
- (b) Supporting subordinate non-executive staff.

d In the income tax returns submitted by the appellant for the years of assessment 1972 to 1974 inclusive, the appellant described the allowances/perquisites paid to its executives as **bonus**. The number of executives eligible for such payments had increased since the first resolution.

e On 24 December 1973, the appellant passed a resolution approving the payment of **commissions** to the executives at a rate based on the **net profit** of the Head Office/Penang Branch. This resolution was passed to ensure payment of commissions to the executives at their request. The rate of commission payable to each executive is subject to variation from year to year and by resolution of the Board of Directors prior to payment each year. Different rates were prescribed for the Head Office and Penang Branch ranging from 15% to 23%. For the years 1974 to 1976 the payments were described as **Executives' Commission** and for the years 1977 to 1980 the payments to directors were described as **Directors' Commission** and payments to executives who were not directors as **Staff Commission**.

h Except for Madam Yap, the directors and executives who were paid the commission are on the monthly payroll of the appellant. They are therefore employees as defined by s. 2 of the Act. In addition all directors who are executives received directors' fees. There is no contract in writing that the executives be paid the commission. The subordinate staff were paid a yearly

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bonus at the sole discretion of the Managing Director from the amount approved by resolution of the directors each year.

On 12 November 1974, the Finance Minister announced in Parliament that effective from the year of assessment 1975 onwards the amount of annual bonus payable to an employee allowed for tax deduction purposes will be limited to two-twelfths of salary. This announcement was followed by the addition of a new sub-section 39(1)(h) to the Income Tax Act. In 1976, paragraph (h) was amended to restrict bonus to RM1,000 or two-twelfths of salary whichever is greater.

The appellant says it has no intention to avoid payment of tax but contends that s. 39(1)(h) applies to bonus and not to commission, thereby drawing a distinction between the two payments. In a taxing statute, the question always is what is the real character of the payment, not what the parties call it: *C.I.R. v. Wesleyan & General Assurance Society* 30 TC 11. The issue whether commissions paid to employees as incentive payments from profits is bonus in the context of s. 33 read with s. 39(1)(h) has been finally considered by the Supreme Court in *Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd.* [1988] 2 MLJ. 99 where it was held at page 105:

The payment may be gratuitous as in the case of the non-managerial staff or it may be payment which the managerial staff are entitled as "incentive" but nevertheless it is still a "bonus".

In my judgment the decision in the *Highlands* case applies to the facts of this appeal.

For the reasons stated, I dismiss this appeal with costs and confirm the Deciding Order of the Special Commissioners.

LEE CHEE ONN

v.

LEE KENG SOON & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[PETITION NO. D2-26-22-93]
16 MAY 1994

COMPANY LAW: Section 181 Companies Act 1965 - Petition for shareholding in 2nd respondent company to be purchased by 1st respondent, release of petitioner as guarantor and release of petitioner's property charged as security for facilities granted to 2nd respondent - 2nd respondent family company - 1st respondent majority shareholder - Petitioner given free hand to manage company - Differences arising between 1st respondent and petitioner - 1st respondent asserting control over company and excluding petitioner from management of company - Petitioner giving notice deeming himself constructively dismissed as manager - Contention that affairs of company being conducted in manner oppressive or in disregard or unfairly discriminatory or prejudicial to petitioner as minority shareholder of 2nd respondent - Whether justified.

- e** The 2nd respondent (the company) was a family company dealing in textile. The 1st respondent, the chairman and managing director, was the majority shareholder holding 160,000 shares and the petitioner, a director and manager held 40,000 shares. The petitioner was given a free hand in the management of the company in Kuala Lumpur whilst the 1st respondent ran his other company in Singapore (the Singapore company). Differences between the 1st respondent and petitioner emerged when the petitioner suggested the company purchase the textiles directly from the suppliers instead of from the Singapore company to cut costs. The 1st respondent disagreed and thereafter began to assert control over the company, and by a series of actions excluded the petitioner from the management of the company. On 4 August 1993 the petitioner gave notice to the 1st respondent that he deemed himself constructively dismissed as the manager of the company.
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- i** The petitioner had stood as guarantor for the company in respect of facilities granted by 3 banks to the company and had also charged his property as security. Pursuant to a petition the petitioner sought to sell his shares to the 1st respondent and to secure his release as a